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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 521

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

Petitioner-Appellant,

vs.

SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

On Appeal from the Supreme Court of the State of Oregon.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The record filed herein shows that the constitutional issues involving equal protection, due process and the Commerce Clause were raised by Appellant at the earliest possible opportunity, maintained throughout, and have never been waived (Jur. St. A2-A6). The decision in the trial court (Jur. St. A7-A11) rested on a finding of the invalidity of the tax statute as applied to Appellant under the Commerce Clause. Therefore, it was

unnecessary to discuss, in addition, the equal protection and due process arguments. Both of the latter matters were argued in the briefs before the Oregon Supreme Court although, for reasons unknown to Appellant, the Oregon Supreme Court failed to mention either of these contentions in its Opinion (Jur. St. A12 to A25).

SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED

A. The "Equal Protection" Clause.

As recently as 1959, this Court held, regarding the application of an ad valorem property tax between foreign and domestic taxpayers, that the taxpayer had standing to raise the constitutional issue. The case was heard on appeal, not by certiorari.

> Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527, 3 L. Ed. 2d 480, 485, 79 S. Ct. 437 (1959).

This Court further held that a state, in imposing excise taxes, is not required to resort to close distinctions or maintain a precise, scientific uniformity but stated:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "

In the present appeal, the object of the legislation is the taxation by a privilege tax of the intrastate business of a motor vehicle common carrier. Where there are no local incidents in connection with the interstate

operations of the carrier, the application of an excise tax for the privilege of doing intrastate business upon *all* interstate business of the taxpayer within the state is a palpably arbitrary classification having no fair and substantial relation to the object of the legislation.

B. The "Due Process" Clause.

Appellees contend that due process of law asks only that the state have jurisdiction to tax and that the tax measure reach only income earned in Oregon (Mot 5). If the capable legal counsel for the State of Oregon believe that the foregoing represents the extent of due process protection in the field of state taxation of interstate commerce, then it would seem that the scope of due process protection in this field should be delineated by this Court upon this appeal.

It is true that this Court has recently limited its discussion of the application of the due process clause of the 14th Amendment in tax cases to the question as to whether or not due process is satisfied if a sufficient nexus is indicated between the taxing state and the taxpayer.

> Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 421 (1959).
>
> Scripto, Inc. v. Carson, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960).

However, due process is also violated where the application of the tax statute is unreasonable and arbitrary, not fairly apportioned and there is not a reasonable and fair relationship between the application of the tax and the taxable privilege.

Hans Rees' Sons Inc. v. North Carolina, 283 U.S. 123, 75 L. Ed. 879, 51 S. Ct. 385 (1930).

Union Refrigerator Transit v. Kentucky, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905).

Fargo v. Hart, 193 U.S. 490, 24 S. Ct. 498, 48 L. Ed. 761 (1904).

Ott v. Mississippi Valley Barge Line, 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

C. The "Commerce Clause."

The main thrust of this appeal is directed to the invalidity under the "Commerce Clause" of the application of the excise tax to appellant taxpayer by the appellees, who have raised these points in their motion to dismiss.

1. Conflict between the majority and minority opinions in the Spector case (Mot. 5).

The conflict in theory between the two majority and minority opinions is obvious from a reading of the portions quoted (Jur. St. 13, Mot. 5). The cases cited by appellees in support of their position either involve a different type of tax or a tax levied upon a local intrastate activity where receipts from interstate business in the particular circumstances were held to be a reasonable measure of the intrastate activity.

Matson Nav. Co. v. State Board (1936), 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (Tax on a domestic corporation for the exercising of corporate privileges within the state, a "franchise tax to be").

Memphis Natural Gas Co. v. Stone (1947), 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (Mississippi franchise tax based on capital used within the state).

McGoldrick v. Berwind-White (1940), 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (Tax upon local delivery of goods for consumption within the taxing state; treated as analogous to a "use" tax).

Western Livestock v. Bureau (1937), 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (Taxpayer operated a local printing business; value of local activity could be measured by receipts, including interstate receipts).

Ford Motor Co. v. Beauchamp (1939), 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304 (Franchise tax upon permanently located automobile assembly plants within the state; value of franchise could be measured by interstate receipts).

In the present case, appellant operated as a motor vehicle common carrier in intrastate commerce in Oregon and was subject to an excise tax for the privilege of doing this business. But appellant also conducted substantial operations in interstate commerce, its local business therein including only activities which have been declared by this Court not to be separable local incidents which may be made the basis for privilege taxation."

Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

Nevertheless, appellees have levied a privilege tax on *all* of appellant's business, both interstate and intrastate, although a recognized measure exists by which the tax can be levied only upon intrastate business and the tax made co-extensive with the privilege subject to taxation.

If the cases cited by appellees are distinguishable, then Spector Motor Service, supra, is in direct conflict

therewith and a substantial federal question is presented. If they are distinguishable, then the matter should be reviewed by this Court to clarify their application and to clarify the meaning of the Spector decision for the benefits of the parties here involved and other taxpayers and tax commissions with similar problems.

2. The "Measure" of the tax.

Appellees describe this appeal as involving the "measure" of the tax. In this regard, the so-called three factor test is not here involved despite the reference thereto on page 2 of appellee's motion. The regulation printed on pages 18 and 19 has no relevance to the facts in this appeal. However, even if it had been used, revenue miles still determine the allocation of other factors to Oregon which in turn determine the allocation of appellant's income to Oregon. The issue is not concerning the details of the measure but the fact that in the present case it obviously and patently has as its object the inclusion of all of appellant's interstate business within the State of Oregon.

The application of a state's privilege tax is limited by the commerce clause to intrastate commerce. Appellant's business is transportation of goods interstate and intrastate, the very essence of commerce. It performs no local activity nor are there local incidents separate and apart from the transportation. The State in imposing a privilege tax on its intrastate business used revenue (line-haul) miles in its allocation but included *all* miles traveled by appellant's trucks in both interstate and intrastate commerce within the state in levying the tax.

There is no attempt to limit the measure to intrastate commerce. When this occurs we are no longer considering a "measure" as such for the allocation formula clearly embraces an improper object of the privilege tax, namely, all of appellant's activity in interstate commerce. The result is, as stated by this Court in Gwin, White & Prince v. Henneford, 305 U.S. 434, 438, 83 L. Ed. 272, 275, 59 S. Ct. 325 (1938),

> " . . . that the tax, though nominally imposed upon Appellants' activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered, both within and without the state and burdens the commerce in direct proportion to its volume."

In this case, the measure patently purports to interdict all of appellant's interstate commerce within the State of Oregon, an application of the privilege tax statute held unconstitutional by this Court in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 72 L. Ed. 833 (1951). Further, when interstate commerce reaches the state line of the State of Oregon, it then becomes subject to privilege taxation. To that extent, the application of its taxing statute urged by appellees burdens commerce without the state as well as within the state.

Appellees on pages 11 and 12 attempt to take advantage of a presumption of validity in their favor. There is a presumption of validity in favor of the state in the usual regulatory statute attacked on "due process" grounds. But when the "due process" clause is applied to state taxation, the presumption does not have equivalent validity. Freeman v. Hewitt, 329 U.S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946)

> " . . . attempts at such taxation have always bee more carefully scrutinized and more consistently r sisted than police power regulations of aspects such commerce."

Further, this same opinion holds that any interferen with interstate commerce by way of taxation is repugna to the commerce clause. There is no presumption validity of a state regulatory measure when it is cha lenged under the commerce clause. Whatever burde if any, of appellant is met when the measure on its fa includes all of appellant's activity in interstate commer within the taxing state.

3. Net Income Tax and Privilege Tax.

The Oregon Supreme Court erroneously equated tax on net income and a privilege tax measured by n income. Appellees describe this language as dictum. W disagree. It was one of the bases for its decision as ma be seen from the following quotation from the opinio of the Oregon Supreme Court (Jur. St. A19):

> "In the case here, v e think there is little to di tinguish the tax imposed by §110-1506, OCLA, an the Oregon income tax later imposed by the Co poration Income Tax of 1955. Oregon Laws 195 ch 334."

Thus, the Oregon Supreme Court attempts to draw sup port for its decision from Northwestern States Portlan Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 35 3 L. Ed. 2d 421 (1959), which decision involved a ta on net income and not a privilege tax for the privileg of doing business within the state measured by net in come (See Jur. St., pages 17-19).

The best answer to contentions of appellees (I
14-16) concerning decisions from other states is a r
ing and analysis of the cases themselves to demonst
the conflicts therein.

CONCLUSION

If the decision of the Oregon Supreme Court in t
case is upheld, it will mean that states may tax
privilege of doing business in interstate commerce, e
though there are no local incidents in connection w
the interstate commerce which would otherwise exp
it to taxation. The privilege tax levied by appellees
viously and patently is applied to all interstate co
merce performed by appellant, even though accur
mileage records and a recognized means of apportio
ment permit the segregation of the two types of activi
For these reasons, the question here involved me
plenary consideration with briefs on the merits and o
argument.

Respectfully submitted,

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